

1
2
3
4
5
6
7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**
9

10 V.F. LIPTAK,

11 Plaintiff,

12 v.

13 ALLY BANK, *et al.*,

14 Defendants.
15

Case No. 2:12-CV-00882-KJD-GWF

ORDER

16 Presently before the Court is Plaintiff's Motion to Recuse (#5). Also before the Court is
17 Plaintiff's Motion for Temporary Restraining Order (#2). Finally before the Court is Defendant Ally
18 Bank's Motion to Dismiss (#14). Though the time for doing so has passed, Plaintiff has failed to file
19 a response in opposition to the motion to dismiss.

20 **I. Motion to Recuse and Motion for Preliminary Injunctive Relief**

21 It appears, construing liberally from Plaintiff's *pro se* motion, that Plaintiff is moving to have
22 the current judge recuse himself under 28 U.S.C. § 455(a) which requires a judge to recuse himself in
23 any proceedings in which his or her impartiality might reasonably be questioned. Essentially,
24 Plaintiff asserts that the court must be biased, because it did not act immediately to deny Plaintiff's
25 meritless motion for a temporary restraining order. Plaintiff asserts that the court must have acted
26 out of bias because he contends that the court withheld ruling because he did not file a certificate of

1 interested parties as required by Federal Rule of Civil Procedure 7.1 and Local Rule 7-1. The only
2 basis for this argument that the court can find in the record is the Clerk of the Court's notation in the
3 Notice of Electronic Filing (#1) associated with the filing of Plaintiff's complaint which states that
4 certificates of interested parties were due by June 3, 2012. Plaintiff, not being a corporation, was
5 free to disregard the requirement.

6 The Court did not immediately grant Plaintiff a hearing because it was clear from his
7 pleadings that he did not make a clear showing of likely success on the merits. Temporary
8 restraining orders are governed by the same standard applicable to preliminary injunctions. See
9 Dumas v. Gommerman, 865 F.2d 1093, 1095 (9th Cir. 1989). To qualify for injunctive relief, a
10 plaintiff must demonstrate: (1) a likelihood of success on the merits; (2) a likelihood of irreparable
11 harm; (3) the balance of hardships favors plaintiff; and (4) an injunction is in the public interest. See
12 Winter v. Natural Res. Def. Council, 555 U.S. 7, 120 (2008); eBay Inc. v. MercExchange, L.L.C.,
13 547 U.S. 388 (2006).

14 However, "[a] preliminary injunction is an extraordinary remedy, one that should not be
15 granted unless the movant, by a clear showing, carries the burden of persuasion." Mazurek v.
16 Armstrong, 520 U.S. 968, 972 (1997). Here, Plaintiff has failed to make a clear showing of
17 likelihood of success on the merits. Particularly, it is clear from the pleadings that Plaintiff's claims
18 are barred by the Rooker-Feldman doctrine as Plaintiff seeks to have this court declare four prior
19 judgments from state and federal courts in Texas invalid. Therefore, the Court denies Plaintiff's
20 motion for a temporary restraining order.

21 Finally, Plaintiff's motion to recuse must be denied, because he has failed to establish that the
22 Court's impartiality might be reasonably questioned. See Toth v. Trans World Airlines, 862 F.2d
23 1381, 1387-88 (9th Cir. 1988)(bias or prejudice justifying recusal must arise from an extrajudicial
24 source and not from conduct or rulings made during the course of the proceeding). Plaintiff has not
25 demonstrated any extrajudicial source of bias or prejudice. Therefore, the Court denies his motion to
26 recuse.

1 II. Unopposed Motion to Dismiss

2 Local Rule 7-2(d) allows the Court to consider failure to file points and authorities in
 3 opposition to a motion as consent to the motion being granted. Therefore, in accordance with Local
 4 Rule 7-2(d) and having considered the motion on the merits, the Court grants Defendant Ally Bank's
 5 motion to dismiss. First, Plaintiff's claims are clearly precluded by both the Rooker-Feldman
 6 doctrine and issue and claim preclusion. See Henrichs v. Valley View Development, 474 F.3d 609,
 7 613-14 (9th Cir. 2007). The Rooker-Feldman doctrine provides that federal district courts lack
 8 jurisdiction to exercise appellate review over final state court judgments. Rooker v. Fidelity Trust
 9 Co., 263 U.S. 413, 415-16 (1923); District of Columbia Court of Appeals v. Feldman, 460 U.S. 462,
 10 482-86, (1983); Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 283-84 (2005).
 11 Essentially, the doctrine bars "state-court losers complaining of injuries caused by state-court
 12 judgments rendered before the district court proceedings commenced" from asking district courts to
 13 review and reject those judgments. Id. at 284. Absent express statutory authorization, only the
 14 Supreme Court has jurisdiction to reverse or modify a state court judgment. See Henrichs, 474 F.3d
 15 at 614. The clearest case for dismissal based on the Rooker-Feldman doctrine occurs when "a
 16 federal plaintiff asserts as a legal wrong an allegedly erroneous decision by a state court, and seeks
 17 relief from a state court judgment based on that decision...." Noel v. Hall, 341 F.3d 1148, 1164 (9th
 18 Cir. 2003).

19 Rooker-Feldman does not override or supplant issue and claim preclusion doctrines. Exxon
 20 Mobil, 544 U.S. at 284. The doctrine applies when the federal plaintiff's claim arises from the state
 21 court judgment, not simply when a party fails to obtain relief in state court. Noel, 341 F.3d at 1164-
 22 65 (citing GASH Assocs. v. Village of Rosemont, 995 F.2d 726, 729 (7th Cir. 1993)). Preclusion,
 23 not Rooker-Feldman, applies when " 'a federal plaintiff complains of an injury that was not caused
 24 by the state court, but which the state court has previously failed to rectify.' " Noel, 341 F.3d at 1165
 25 (quoting Jensen v. Foley, 295 F.3d 745, 747-48 (7th Cir. 2002)). In Liptak's present action, he
 26 makes both kinds of complaints. Therefore, Liptak's claims against Ally Bank are dismissed.

1 Furthermore, the Court would normally allow Plaintiff to amend his complaint. However,
2 doing so would be futile, because the Court would otherwise dismiss the complaint under Rule
3 12(b)(3). Plaintiff has made no showing that the District of Nevada is the proper venue for this
4 action arising based on facts that entirely occurred in the State of Texas. Finally, Plaintiff has failed
5 to state a claim upon which relief may be granted against Defendant Ally under the Fair Debt
6 Collection Practices Act ("FDCPA"). Plaintiff's complaint alleges no facts that even if taken as true
7 would allow the Court to find that Defendant Ally is a "debt collector" falling under the FDCPA.
8 Plaintiff also fails to allege facts that Ally threatened to take action that is not intended or could not
9 legally be taken. Therefore, the Court grants the motion to dismiss without leave to amend.

10 III. Conclusion

11 Accordingly, IT IS HEREBY ORDERED that Plaintiff's Motion to Recuse (#5) is **DENIED**;

12 IT IS FURTHER ORDERED that Plaintiff's Motion for Temporary Restraining Order (#2) is
13 **DENIED**;

14 IT IS FURTHER ORDERED that Defendant Ally Bank's Motion to Dismiss (#14) is
15 **GRANTED**.

16 DATED this 19th day of September 2012.

17
18 

19 _____
20 Kent J. Dawson
21 United States District Judge
22
23
24
25
26